

Chugh (Migration) [2018] AATA 3710 (8 August 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Samapti Chugh Mr Ranjit Singh Sra Mr Abhayraj Singh Sra
CASE NUMBER:	1701159
DIBP REFERENCE(S):	BCC2016/1609947 BCC2017/1041127
MEMBER:	Kira Raif
DATE:	8 August 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 887 (Skilled - Regional) visas: • Public Interest Criterion 4020 for the purposes of cl.887.223 of Schedule 2 to the Regulations.

Statement made on 08 August 2018 at 4:36pm

CATCHWORDS

MIGRATION – Skilled (Regional) (Class VB) visa – Subclass 887 (Skilled – Regional) – bogus document – payslip for a particular period – incoming passenger and outgoing passenger card – reason for travel – visit family and friends – work related trip – cash payments – formal employment start date – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), Schedule 2 cl 887.223, Schedule 4 PIC4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIBP [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

Application for review

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 January 2017 to refuse to grant the applicants Skilled (Residence) (Class VB) visas under s.65 of the *Migration Act 1958* (the Act).
4. The applicants are national of India. The first named applicant ('the applicant') was born in August 1981. She applied for the visas on 2 May 2016. The application includes the applicant's spouse and child. The delegate refused to grant the visas on the basis that the applicant did not satisfy the requirements of cl.887.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found the applicant did not meet Public Interest Criterion (PIC) 4020. The applicants seek review of the delegate's decision.
5. The applicants appeared before the Tribunal on 8 August 2018 to give evidence and present arguments. The applicants were represented in relation to the review by their registered migration agent. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

6. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.887.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
7. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4).
8. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because

of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

9. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
10. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The applicant provided to the Tribunal a copy of the primary decision record which contains the following information.
12. The applicant stated in her application that she was employed by India Junction Supermarket at Edvardstown between 1 July 2014 and 19 April 2016. The applicant included in support of that claim a number of payslips for the above period and an employment reference and statutory declarations signed by the director Jaskaranjot Singh, which refer to the applicant's employment as retail clerk. The applicant provided payslips and employment references, as well as information on the application forms concerning her employment.
13. In response to Question 18 of Form 80 the applicant stated that she was outside of Australia between 19 April 2015 and 9 May 2015. However, Departmental records show that the applicant departed Australia on 19 April 2015 and returned on 20 May 2015. The applicant signed the Incoming and Outgoing Passenger Cards on her departure and return confirming the above dates.
14. The applicant provided with her application a payslip for the period of 4 May 2015 to 17 May 2015. The delegate formed the view that this document was a bogus document because the applicant was outside Australia during that period and was unable to continue her full-time employment for an Australian company.
15. In response to the natural justice letter the applicant provided a submission of 9 January 2017 and amended the dates of her travel. With respect to her employment, the applicant states that her trip to India was work related. The applicant and her employer provided statements indicating the applicant met with exporters and bought samples on behalf of India Junction Pty Ltd. The applicant claims that for that reason, she was paid for the duration of her trip.
16. The primary decision record indicates that the applicant's claims are inconsistent with the information she provided on her Outgoing Passenger Card which the applicant signed on 19 April 2015 when departing Australia. The applicant stated that the major reason for her overseas travel was 'visiting friends or relatives and holidays'. The applicant made no mention that her visit involved work activities. The applicant also stated on Form 80 that the reason for her visit was to meet her family.
17. The applicant provided additional evidence to the Tribunal. In her written submission of 1 August 2018 the applicant states that after arriving in Australia as a holder of the subclass

475 visa, she was employed by India Junction Pty Ltd on a full-time basis as a retail clerk. That employment was between 1 July 2014 and 18 April 2016. In response to the delegate's concerns about the applicant's bank records not showing regular salary payments, the applicant and her employer explained that the applicant was mostly paid in cash, as it was more convenient, and complied with her taxation responsibilities, confirmed through the PAYG payment summary and the applicant's tax assessment notices. The applicant notes that she provided a number of documents concerning her employment including payslips, taxation records, superannuation records and declarations.

18. With respect to the payslip that formed the basis of the primary decision, the applicant states that the document was not a bogus document but an accurate document that reflects the work she has performed on behalf of her employer while overseas. The applicant described the nature of the business, noting that the business has a high volume of imported goods and deals with overseas suppliers. The applicant claims that she knew of suppliers of ceremonial bangles in India and her employer asked her to visit the suppliers and obtain quotes and / or samples when visiting India. When the visa applicant travelled overseas, her employer gave her authorisation to deal with the suppliers and source samples and quotes for various goods. The parties agreed that the employer would pay wages to the applicant and this agreement was formalised in writing. The applicant presented affidavits from a number of traders in India confirming the arrangement. Upon return to Australia, the applicant states she presented a written summary of her visits and samples and quotations but due to the passage of time, these documents cannot be located.
19. With respect to the Outgoing Passenger Card the applicant states that the card refers to the 'main reason' for travel and her primary travel purpose was to visit friends and family. The applicant states that she had spent three out of four weeks with her family and she had only spent one week conducting work activities. As the card only asked for the main reason, she did not think about listing other activities.
20. The applicant notes that there was no purpose for her to falsify a single payslip when she had already met the statutory requirement to have been employed for over one year. The applicant claims this payslip had no bearing on her ability to meet the statutory requirements for visa grant. The Tribunal does not consider this to be a convincing argument, given that the issue here is not the benefit to the applicant but the nature of the presented evidence. If the payslip in question is found to be a bogus document, it is not necessary to establish that it served any beneficial purpose. If it is found to be a bogus document, PIC 4020 would be engaged whether or not the document served any practical purpose.
21. The applicant claims that there is no purposeful untruthfulness in the provision of the payslip as both she and her employer believed the document to be true. The applicant seeks to distinguish her circumstances from what was discussed in *Trivedi*. The Tribunal does not accept that argument. If it was found that the applicant did not perform the work that is reflected on the payslip, that payslip would contain information that is false or misleading in a material particular and the creation of the payslip could not be said to be anything other than containing an element of fraud or deception. It is not a matter where a typographical error or an inadvertent mistake was made when the payslip was prepared. If the applicant did not perform the work as claimed, the payslip reflects positive steps to mislead.
22. The applicant raised a number of concerns with the delegate's findings and reasoning. The Tribunal does not consider this helpful, as it conducts a review de novo.
23. In oral evidence to the Tribunal, the applicant explained the nature of her employment at the supermarket. She stated that she had the position of a retail clerk, she took the job because it was flexible and she had a baby to look after and it was hard for her to find employment in her own field. The applicant said she was the only employee at the time and worked 7.5 – 8

hours a day, five days a week. Her job involved looking after the customers, checking and rotating the stock, checking the inventory, general housekeeping and cleaning. The applicant said she was able to do the negotiations with the overseas suppliers because she is familiar with the bangles and also with the food stock as her family has businesses in agriculture. As she was travelling overseas and her employer did not have time to travel, he asked her to make some inquiries and they agreed that he would pay her for 38 hours. In the end, they did not proceed with the purchases because they ended up being more expensive than buying in Australia.

24. The Tribunal notes that there are considerably more documents before the Tribunal than were before the delegate. These include affidavits from the traders in India and some evidence of the applicant's activities in India, as well as evidence of the applicant's employment in Australia, including taxation records, superannuation records, the company financial records and other materials. The applicant explained that she relied on the advice of her previous migration agent and he did not inform her what documents needed to be provided.
25. The Tribunal is satisfied that the applicant had worked in the supermarket, as claimed. The issue however is not the applicant's employment but the payslips which she provided for the period of her travel to India.
26. The Tribunal finds some of the presented evidence problematic. For example, the Tribunal is concerned about the formal letter from the applicant's employer to the applicant instructing her to make inquiries during her trip to India. Given that the applicant was the only employee in the business and the applicant's evidence that her employer preferred oral communication, the Tribunal is not satisfied that he would formally and in writing instruct the applicant to carry out business activities in India. The Tribunal is concerned about the applicant's evidence that she did not declare the business samples on her Incoming Passenger Card even though it specifically refers to business samples. The Tribunal is concerned that the applicant's superannuation summary shows the period of payment commencing on 28 June 2015 even though the applicant claims that she formally started employment on 1 July 2015 and was not paid prior to that date. The Tribunal is also concerned that the company's financial records show no superannuation payments for 2015 which appears to be inconsistent with the applicant's superannuation summary.
27. Despite these concerns, the Tribunal is satisfied that the applicant did work in the supermarket. This is supported by her taxation and superannuation records. The Tribunal is of the view that there is a reasonable possibility that the applicant did carry out some investigations during her trip to India. She did explain to the Tribunal her activities and how she went about organising the investigations. The Tribunal considers it likely that she did carry out such activities. If that was the case, then it is reasonable that the applicant would be paid for such work by her Australian employer. The payslip in question does not contain false or misleading information.
28. Ultimately, the Tribunal has formed the view that there is insufficient evidence to state that the information the payslip was incorrect or contained false or misleading statement. The Tribunal is not convinced that the payslip in question is a bogus document. The Tribunal does not consider that the applicant has otherwise given or caused to be given, information that was false or misleading in a material particular. The Tribunal finds that the applicant meets PIC4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

29. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the

period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

30. There is no evidence that the applicant and each member of her family unit had been refused a visa on the basis of a failure to meet PIC 4020. The Tribunal finds that PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

31. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no suggestion that the applicant's identity is at issue. The applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

32. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
33. There is no evidence that the visa has been refused on the basis of a failure to satisfy PIC 4020(2A). Therefore PIC 4020(2B) is met.
34. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.887.223.

DECISION

35. The Tribunal remits the applications for Skilled (Residence) (Class VB) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 887 (Skilled - Regional) visas:
- Public Interest Criterion 4020 for the purposes of cl.887.223 of Schedule 2 to the Regulations.

Kira Raif
Senior Member